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Workmen's Compensation—Latent Injuries and the Period of Limitations on Filing Claims

When it is undisputed that an industrial accident arising out of and in the course of employment proximately results in a disabling injury, and the claim for compensation is filed within a reasonable time after the disability, few would doubt that an award favorable to the claimant should issue. Where the injury is latent or progressive, however, and does not manifest itself until long after the accident, an otherwise meritorious claim may be denied under a provision like G.S. § 97-24(a) which forever bars the right to compensation unless a claim is filed with the Industral Commission within two years *after the accident.*[1] In *Whitted v. Palmer-Bee Co.*,[2] for example, a case involving the old one year limitation period, the claimant was involved in an apparently trivial accident and sustained a very slight injury to his right eye by a flying sliver of metal. The incident was reported to the employer promptly, but no claim for compensation was made as the employee returned to the job almost immediately. Some eighteen months later, however, a cataract developed in the right eye and the claimant totally lost the sight of the eye. The North Carolina Supreme Court held that the employee's failure to file claim within one year after the *accident* forever barred his right to compensation.[3] In other words, the limitation period began running on the date of the accident against a claim which had not at that time matured, and when the claim did mature some eighteen months later, it was held to be already barred.

A result more in keeping with the remedial purposes of workmen's compensation legislation is possible, indeed, is usual, where the limitation period is dated not from the time of the *accident,* but from the time of the *injury.*[4] In *Hughes v. Industrial Comm'n,*[5] where the seemingly

[1] N.C. GEN. STAT. § 97-24(a) (1958) provides: "The right to compensation under this article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter." (The 1955 amendment enlarged the period for filing claims from one to two years.)

[2] 228 N.C. 447, 46 S.E.2d 109 (1948). The *Whitted* case distinguished Hardison v. Hampton, 203 N.C. 187, 165 S.E. 355 (1932) which had held that Form No. 19, to be filed with the Commission by the employer upon the occurrence or knowledge of an injury, constituted a "claim" within the intendment of G.S. § 97-24(a). At the time of the *Whitted* decision, however, Form No. 19 had been amended and contained a statement on its face that it was filed in compliance with G.S. § 97-92 *only* and was not the employee's claim for compensation. See Lilly v. Belk Bros., 210 N.C. 735, 188 S.E. 319 (1936).

[3] *Accord,* Wilson v. Border Queen Kitchen Cabinet Co., 221 Ark. 580, 254 S.W.2d 682 (1953); Gavigan v. Visiting Nurse's Ass'n, 125 Conn. 290, 4 A.2d 923 (1939); Rutledge v. Sanders, 181 Kan. 369, 310 P.2d 950 (1957).

[4] The "accident" contemplated by workmen's compensation legislation is any untoward event which results in some injury to the workman. It should be pointed out that in any accident giving rise to a right to workmen's compensation there will always be some traumatic or "injuring" effect at the precise moment of the accident although the employee may be unaware of it. It is the premise of this

trivial accident occurred in December, 1953, it was not until October, 1954 that "traumatic sinovitis, left wrist" was discovered. Claim for compensation was made more than twenty-one months after the accident. The Arizona court, while holding the claim timely as against a one year period of limitation which ran from the time of the *injury,* said that the employee could not have been expected to make a claim for compensation at the time of the accident, for the injury was not then compensable, and that consequently the statute of limitations did not begin to run until the injury became manifest.[6]

Summarization of the statutes, in respect to their claim period dates, is difficult because of considerable variety and rather frequent amendment. However, it appears that of the some fifty workmen's compensation statutes in effect in this country at least twenty-six clearly date the claim period from the time of the "accident."[7] Most of the remaining

Note, however, that when the injury is latent and its full extent is essentially unknowable until some time after the accident that produced it, the statute of limitations should not begin to run until the employee knows or has reason to know that he suffers from a compensable injury.

[5] 81 Ariz. 264, 304 P.2d 1066 (1956).

[6] *Accord,* Hartford Acc. & Indem. Co. v. Industrial Comm'n, 43 Ariz. 50, 29 P.2d 142 (1934) (cancer developed more than two years after the accident); Acme Body Works v. Koepsel, 204 Wis. 493, 234 N.W. 756 (1931) (cataract resulted more than six years after the accident).

[7] ALA. CODE tit. 26, § 296 (1940) (claim must be filed within one year from the time of the accident); ARK. STAT. § 81-1318 (Supp. 1957) (two years from the date of the accident; formerly ran from the date of the "injury" but amended in 1948); CAL. LAB. CODE § 5405 (one year from the date of the "injury," but § 5411 defines the date of the "injury" as the date of the "accident"); COLO. REV. STAT. ANN. § 81-13-5 (1954) (six months after the injury, but § 81-13-6 provides that any disability beginning more than five years after the *accident* is conclusively presumed not to be due to the accident; the latter section has been held to be a rule of evidence and not a statute of limitations. Industrial Comm'n v. Weaver, 81 Colo. 191, 254 Pac. 444 (1927)); CONN. GEN. STAT. § 31-168 (1958) (one year from the date of the accident); DEL. CODE ANN. tit. 19, § 2361 (Supp. 1958) (two years from the accident); GA. CODE ANN. § 114-305 (1956) (one year after the accident); IDAHO CODE ANN. § 72-402 (1949) (one year after the date of the accident); ILL. ANN. STAT. ch. 48, § 161 (Smith-Hurd 1950) (six months after the accident); IND. ANN. STAT. § 40-1224 (1952) (two years after the "occurrence of the accident"; formerly two years after the injury, but amended in 1947); KAN. GEN. STAT. ANN. § 44-520a (Supp. 1955) (120 days after the accident); KY. REV. STAT. § 342.185 (1959) (one year from the date of the accident); ME. REV. STAT. ANN. ch. 31, § 33 (Supp. 1957) (in no event to exceed two years from the date of the accident); MD. ANN. CODE art. 101, § 39 (1957) (sixty days after the date of the "accidental injury," but an amendment in 1957 provides that unless claim is made within eighteen months "from the date of the accident" the claim is completely barred); MINN. STAT. ANN. § 176.151 (Supp. 1958) (not to exceed six years from the date of the accident); MONT. REV. CODES ANN. § 92-601 (1949) (twelve months from the date of the "happening of the accident"); N.H. REV. STAT. ANN. § 281:16 (Supp. 1957) (ninety days from the occurrence of the accident); N.J. REV. STAT. § 34:15-51 (1959) (two years after the accident); N.M. STAT. ANN. § 59-10-74 (Supp. 1957) (one year after the accident "causing injury"); N.Y. WORKMEN'S COMP. LAW § 28 (two years after the accident); N.C. GEN. STAT. § 97-24(a) (1958) (two years after the accident); ORE. REV. STAT. § 656.274 (1955) (not later than one year after the accident); PA. STAT. ANN. tit. 77, § 602 (Supp. 1957) (sixteen months after the accident); S.C. CODE § 72-303 (1952) (one year

twenty-four date it from the time of the "injury."[8] In at least one of the "accident" type statutes[9] there are provisions which soften the effect somewhat in the case of latent or inherently unknowable injury caused by accident. Massachusetts,[10] Texas,[11] and Nevada[12] appear at first glance to have "accident" type statutes using the accident as a beginning point for the limitation period; but in each statute there are such broad grounds of excuse for "good cause," "mistake," and the like, that they are for all practical purposes in accord with the better rule that dates the limitation period from the time of the "injury."[13] Although there has been some legislative amendment equating "injury" with "accident,"[14] and, indeed, some successful judicial activity to that effect even under an "injury" type statute,[15] there would appear to be

after the accident); UTAH CODE ANN. § 35-1-99 (1953) (three years from the date of the accident); VA. CODE ANN. § 65-84 (1950) (one year after the accident); WIS. STAT. § 102.01(2) (1957) (limitation period starts on "date of the injury," but "date of the injury" is defined as the "date of the accident"). It should be pointed out that these provisions relate only to claims for accidental *injury*. If the claim is based on accidental *death* the limitation periods invariably begin on the death and not at the time of the accident.

[8] ARIZ. REV. STAT. ANN. § 23-1061 (1956); FLA. STAT. ANN. § 440.19 (1952); IOWA CODE ANN. § 85-26 (1949); MICH. STAT. ANN. § 17.165 (Supp. 1957); MISS. CODE ANN. § 6998-18 (1952); MO. ANN. STAT. § 287.430 (1949); N.D. REV. CODE § 65-0501 (1943); OHIO REV. CODE ANN. § 4123.84 (1953); OKLA. STAT. ANN. tit. 85, § 43 (1951); R.I. GEN. LAWS ANN. § 28-35-57 (1956) (two years after the "occurrence or manifestation of the injury"); S.D. CODE § 64.0611 (1939); TENN. CODE ANN. § 50-1003 (1955); WASH. REV. CODE § 51.28.050 (1952); W. VA. CODE ANN. § 2540 (1955); WYO. COMP. STAT. ANN. § 72-160 (Supp. 1957).

[9] LA. REV. STAT. § 23:1209 (1950): "[W]here the injury does not result at the time of, or develop immediately after the accident, the limitation shall not take effect until the expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the proceedings have been begun within two years from the date of the accident." Despite the provision for latent injuries, the claim still must be filed within two years after the date of the *accident*. See MALONE, LA. WORKMEN'S COMPENSATION § 77 (Supp. 1955).

[10] MASS. ANN. LAWS ch. 152, § 49 (1957) provides that failure to make claim within the prescribed six months after the "occurrence of the injury" will not bar proceedings for compensation if the late filing was occasioned by "mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay."

[11] TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (1956) provides in part: "For good cause, the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of claims before the Board."

[12] NEV. REV. STAT. § 616.500(6) (1957) also allows the Nevada Industrial Commission to waive the strict claim requirement where "for some sufficient reason" the claim could not have been made.

[13] 2 LARSEN, WORKMEN'S COMPENSATION § 78.42(a) (1952).

[14] CAL. LAB. CODE § 5411 provides: "The date of the injury, except in cases of occupational disease, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed." Similarly, WIS. STAT. § 102.01(2) (1957) defines the "date of the injury" as the "date of the accident." See note 7 *supra*.

[15] Graham v. J. W. Wells Brick Co., 150 Tenn. 660, 266 S.W. 770 (1924). The court stated that "while the terms 'accident' and 'injury' are not synonymous, the accident produced the injury and in point of time they were concurrent. [T]he legislature . . . fixed the date of the injury at the date of the accident and not at some remote time thereafter when the injured employee became definitely satisfied that he was disabled as a result of the accident." 150 Tenn. at 667, 266 S.W. at

overwhelming judicial agreement that under a limitation period dating from the time of the "injury" no claim for compensation arises until the injury results in disability, or in some other overt manner becomes apparent to the claimant.[16]

It is submitted that the harsh result indicated under an "accident" type statute like North Carolina's is the product of a failure to keep in mind the benevolent purposes of workmen's compensation legislation, and to a reluctance to interpret the "claim" for compensation in latent injury cases so as to effectuate those purposes. To say that the limitation period begins to run from the time of the "accident" and not from the time of some compensable injury is to say in those cases where the accident and the injury are not coeval that it begins to run before a claim or a cause of action has really accrued.[17] In common law negligence cases, of course, the cause of action for damages for personal injuries accrues from the time the negligence operates harmfully on the plaintiff, that is, at the time of the accident, and usually the plaintiff's knowledge that any of his rights have been violated is deemed immaterial.[18] But in workmen's compensation the right to compensation is predicated not on negligence but on the sound policy that the expense of industrial injury, however faultlessly incurred, should be distributed to the public

772. The case in effect was overruled, however, in Ogle v. Tenn, Eastman Corp., 185 Tenn. 527, 206 S.W.2d 909 (1947) and it may be safely said that today Tennessee is an "injury" jurisdiction. An interesting example of judicial vacillation on the "accident" versus "injury" problem is to be found in the Oklahoma cases. In Brown & Root, Inc. v. Dunkelberger, 196 Okla. 116, 162 P.2d 1018 (1945), the Oklahoma court had held that the statute of limitations did not begin to run against the filing of a claim for compensation until the disability arising from the injury became apparent to the employee. Three years later, however, in Tulsa Hotel v. Sparks, 200 Okla. 636, 198 P.2d 652 (1948) the Oklahoma court adopted a strict construction policy and in effect overruled the salutary holding of the *Dunkelberger* case.

[16] Salt Lake City v. Industrial Comm'n, 93 Utah 510, 74 P.2d 657 (1937). This decision reversed a line of cases based on Utah Consol. Mining Co. v. Industrial Comm'n, 57 Utah 279, 194 Pac. 657 (1920), which had applied a general statute of limitations and dated it from the accident. (Regrettably, however, the sound holding of the *Salt Lake City* case is now itself legislatively overruled by an amendment to the Utah compensation statute which dates the period from the time of the accident. UTAH CODE ANN. § 35-1-99 (1953). Applying the new amendment, the Utah court in McKee v. Industrial Comm'n, 115 Utah 550, 206 P.2d 715 (1949) said that the claimant's right to compensation was forever barred notwithstanding the fact that he obtained no competent medical diagnosis of his work-caused injury until three years after the accident and had no knowledge of his latent condition until that time.)

[17] Salt Lake City v. Industrial Comm'n, note 16 *supra*, at 513, 74 P.2d at 658.

[18] Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Butler v. Bell, 181 N.C. 85, 106 S.E. 217 (1921). *But see* Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E.2d 649 (1955), to the effect that the general rule in negligence cases that the cause of action accrues and that the statute of limitations runs from the moment of injurious impact should not apply to that type of negligence case involving inherently unknowable harm. The Georgia court said that in such a case the statute of limitations should not begin to run until the plaintiff had reason to know he had a cause of action. *Cf.* Bradt v. United States, 221 F.2d 325 (2d Cir. 1955).

as a cost of production.[19] Consequently, the negligence rules are inapplicable to workmen's compensation legislation. As the Utah court said in *Salt Lake City v. Industrial Comm'n*:[20]

> The compensation act . . . imposes a duty on employers to pay compensation to employees who suffer disability or loss from an injury by accident arising out of or in the course of employment. Not until there is an accident and injury and disability or loss from the injury does the duty to pay arise. *A mere accident does not impose the duty to pay.* Accident plus injury therefrom does not impose the duty to pay. But accident plus injury which results in disability or loss gives rise to the duty to pay. (Emphasis added.)

To be compared with the Utah court's cogent analysis of the nature of a claim for compensation made in an "injury" jurisdiction is that of the Pennsylvania Superior Court in the case of *Lewis v. Carnegie-Illinois Steel Corp.*[21] There a solution of muriatic acid and water was accidentally splashed into the employee's eye, but no serious injury or disability resulted until more than four years later when the claimant lost the sight of the eye as a direct result of the original accident. Applying a one year period of limitation dating from the time of the accident, and holding the claim barred, the court made this curious statement:

> A claim for personal injury arises simultaneously and is complete with the happening of the accident. . . . The statutory limitation . . . applies to the cause of action (the splashing of muriatic acid into the left eye) and not to the extent of the injury (the loss of sight of that eye).[22]

It would doubtless come as a surprise to many workmen and employers in Pennsylvania to learn that upon the occurrence of any accident in the course of employment, however minor and however devoid of any disabling injury, there should exist a "cause of action" for workmen's compensation. The effect of such a strict interpretation of the limitation period for filing claims is to lift the latent injury case out of a statute that was intended to compensate workmen for injuries resulting in a loss of wages and to protect the public from the expense of providing for their care.[23]

The latent injury, traceable to a specific traumatic event which is isolable in point of time, is factually distinguishable from the similarly troublesome occupational disease which results slowly over a relatively

[19] Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 178 (1951).
[20] 93 Utah 510, 513, 74 P.2d 657, 658 (1937).
[21] 159 Pa. Super. 226, 48 A.2d 120 (1946).
[22] *Id.* at 228, 48 A.2d at 121.
[23] Baltimore Steel Co. v. Burch, 187 Md. 209, 49 A.2d 542 (1946).

long period of time because of repeated exposure to a particular hazard.[24] The factual distinction is exemplified in the hernia cases. If the hernia follows as a result of a single definite "accident" it is an "accidental hernia," whereas if it develops as a result of certain types of lifting over a long period of time it may be an "occupational hernia." But aside from the factual difference, there would seem to be little difference in legal principle. The Maryland court,[25] in construing a "date of the disability" limitation provision applicable both to occupational diseases and to accidental injuries, said that in the case of occupational disease the statute of limitations would begin to run "from the time the employee . . . knew or had reason to believe that he was suffering from an occupational disease and that there was a causal connection between his disability and occupation."[26] The same court used much the same reasoning in an accidental injury case,[27] saying that in such event the limitation period does not begin to run until "it becomes or should become reasonably apparent to a workman that he has a compensable disability."[28] The point is that the legislatures and courts have come to recognize the inherently unknowable character of the occupational disease in its earlier stages, and generally rather liberal claim periods for that category of disability have been provided.[29] Even in many of those jurisdictions where the limitation period on accidental injuries dates from the time of the accident, there are to be found separate provisions allowing claims for occupational disease to be filed within a certain period after "disability," "first symptom," "diagnosis," "manifestation," etc.[30] For example, G.S. § 97-58 provides that claims for occupational disease may be filed within one year from "death, disability, or disablement, as the case may be."[31] The North Carolina Supreme Court, in construing this section, has said that the legislature did not intend to require employees suffering from compensable occupa-

[24] Rathjen v. Industrial Comm'n, 233 Wis. 452, 289 N.W. 618 (1940).
[25] Consolidation Coal Co. v. Porter, 192 Md. 494, 64 A.2d 715 (1949).
[26] *Id.* at 506, 64 A.2d at 721.
[27] Gracie v. Koppers Co., 213 Md. 109, 130 A.2d 754 (1957).
[28] *Id.* at 114, 130 A.2d at 757.
[29] See generally, 100 C.J.S., *Workmen's Compensation* § 468 (8)b (1958).
[30] Compare VA. CODE ANN. § 65-84 (1950), requiring that a claim for an accidental injury be filed with the Commission within one year after the accident, *with* VA. CODE ANN. § 65-49 (Supp. 1958), allowing a claim for occupational disease to be filed within one year after the claimant experiences a distinct manifestation, or a diagnosis is made, whichever shall first occur, of an occupational disease.
[31] N.C. GEN. STAT. § 97-58(a) (1958). The term "disability" is defined as an incapacity to earn the wages which the employee was receiving at the time of the injury in the same or any other employment. G.S. § 97-2(i). The term "disablement" as it is applied to cases of asbestosis and silicosis means the actual incapacitation by either disease to earn the wages which the employee was receiving "at the time of his last injurious exposure to asbestosis or silicosis, but in all other cases of occupational disease 'disablement' shall be equivalent to 'disability'. . . ." G.S. § 97-54.

tional disease to diagnose their own condition, or to file a claim for compensation before they know they have such a disease or run the risk of having their claim barred by the statute of limitations.[32] The operative factors in a claim for compensation based on an occupational disease in North Carolina, therefore, are disability and an awareness of the incidence of the particular disease. The employee suffering from an occupational disease[33] does not stand the risk of losing his right to compensation until he knows or has reason to know that he actually suffers from the disease. But the employee who sustains a latent or progressive injury in an industrial accident, an injury as inherently insidious in many instances as an occupational disease, stands to lose forever his right to compensation unless the injury becomes apparent within two years after the accident. It is submitted that notwithstanding the *factual* distinction between occupational disease and accidental injury in their inception, their development is essentially the same, and the same legal principles should apply. For in either event no amount of diligence on the part of the employee would avail until his condition became manifest.

The purpose of a limitation period on filing claims for compensation is the same as for any other statute of limitations: to protect the person to be charged from stale or fraudulent claims that are too old or too doubtful to be successfully investigated and defended.[34] It has been argued that if an employer is to be open to claims filed several years after the occurrence of the accident the very purpose of the limitation period will be defeated.[35] The argument may be simply illustrated. An employee is involved in an accident in the course of his employment and experiences a slight twinge of pain in the back. But if there is any serious injury he is completely unaware of it. Then months or even years later while working around his house he lifts a heavy bag of cement and "slips" a disc. The workman remembers the employment-connected accident but no one else does. To answer the argument, it may be pointed out that there are actually two distinct limitation periods in most statutes[36] with which the employee must comply: The first is the period for giving *notice* of the accident to the employer, and the second is the period for filing *claim* with the particular agency or court for compensation. G.S. § 97-22 requires that written notice of the accident be given to the employer within thirty days after its occurrence,

[32] Huskins v. United Feldspar Corp., 241 N.C. 128, 84 S.E.2d 645 (1954); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

[33] See N.C. GEN. STAT. § 97-53 (1958) where the compensable occupational diseases are enumerated.

[34] Butler v. Bell, 181 N.C. 85, 106 S.E. 217 (1921); Harris v. Traders & Gen. Ins. Co., 200 La. 445, 8 So. 2d 289 (1942). See 1 WOOD, LIMITATIONS OF ACTIONS § 4 (4th ed. 1916).

[35] See 2 LARSEN, *op. cit. supra* note 13, § 78.42(b).

[36] HOROVITZ, WORKMEN'S COMPENSATION 247 (1944).

unless reasonable excuse for late notice is made to the satisfaction of the Industrial Commission.[37] The notice provision should certainly give the employer sufficient protection with respect to investigating the facts of the accident, minimizing the degree of the injury, and soliciting the statements of witnesses. And furthermore the "doubtful claim" argument has been satisfactorily met by Professor Larsen who points out that in any event the claimant must still prove his case, including the "arising out of" requirement and the exercise of due care in discovering the nature of his disability.[38] The ultimate question is whether the procedural purposes to be served by the "accident" type statute are so necessary as to justify their defeating a piece of purportedly protective and remedial legislation.

As the courts are too prone to apply the limitation provision under an "accident" statute by its strict letter, the obvious remedy lies with the legislature, although an occasional court will acknowledge that "justice and fairness" speak for a contrary conclusion.[39] However, at least one court[40] has assumed the task of carrying over into the adjective

[37] N.C. GEN. STAT. § 97-22 (1958). The "reasonable excuse" provision permits the excuse of waiver, or estoppel in not notifying the employer of the accident within the prescribed time. Yet the North Carolina court speaks of the limitation period for filing a *claim* for compensation as a condition precedent to the substantive right to receive compensation, and asserts that it is not an "ordinary" Statute of Limitations. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937). If that is true, there should be no question of waiver of the defense of late filing, or estoppel to assert it, or even fraud in causing the late filing, since the limitation period, if a condition precedent, would limit the *liability* and not the *remedy,* in which case it could not be construed on equitable considerations as analogous to waiver and estoppel. Simons v. Halcomb, 98 Conn. 770, 120 Atl. 510 (1923). Notwithstanding the North Carolina courts assertion that the limitation period is a condition precedent, and even jurisdictional to the right of the Commission to hear a claim, Wray v. Carolina Cotton & Woolen Mills Co., 205 N.C. 782, 172 S.E. 487 (1934), in other cases involving the claim period question the court has stated that, "It must not be understood that we hold an employer may not by his conduct waive the filing of a claim within the time required by law. The law of estoppel applies in compensation proceedings as in all other cases." Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953). An allied problem, to which the same general principles of this comment relate, is that of a recurrence of an injury or a change of condition. G.S. § 97-47 provides that the Commission may review an award and on such review make an award ending, diminishing, or increasing the compensation previously awarded, but no such review can be made after twelve months from the date of the last payment of compensation. Medical or other treatment bills paid by the employer are treated as payments of compensation for the purposes of this section only. It has no relation to the filing of original claims under G.S. § 97-24(a). Payment of medical bills as allowed by G.S. § 97-25 (for the purpose of diminishing the severity of an injury) will not have the effect of an admission of liability by the employer or constitute a waiver of the necessity of filing timely claim with the Commission. Biddix v. Rex Mills, Inc., *supra.*

[38] 2 LARSEN, *op. cit. supra* note 13, § 78.42(b).

[39] Bergstrom v. O'Brien Sheet Metal Co., 251 Minn. 32, 86 N.W.2d 82 (1957). This was also recognized by Mr. Justice Denny in the *Whitted* case. "It may be regretted that we have no provision in our Workmen's Compensation Act to preserve and protect the rights of employees in cases like the one before us." Whitted v. Palmer-Bee Co., 228 N.C. 447 at 453, 46 S.E.2d 109 at 113 (1948).

[40] Keenan v. Consumers Public Power Dist., 152 Neb. 54, 40 N.W.2d 261 (1949).

law of workmen's compensation the beneficent qualities of the substantive, and has realized that the purposes of legislation involving a whole new area of claims and liabilities cannot be effectuated by a rigid interpretation of every word. The Nebraska court, faced with a latent injury problem and a straight "accident" type statute, held that the "literal limitation of the statute has no application where the injury is latent and progressive and the employee is without knowledge of the condition."[41] The court said that in such a case the action for compensation could be brought within one year from the time the claimant obtained knowledge of his condition.

An interpretation of a straight "accident" type statute as running from the time the employee knew or ought to have known that he had a compensable injury can be supported on various grounds.[42] In the first place, it could hardly be presumed that the legislature intended to defeat the purpose of the act by setting up a virtually impossible claim requirement in the case of latent injury, and certainly to the extent that meritorious claims are not awarded the purpose of the act is thwarted.[43] Further, the claim period section should be construed in such a way as to meet the typical coverage formula of "*injury* by accident, arising out of and in the course of employment."[44] Since an *injury* is certainly as important to the coverage formula as an *accident,* the word "accident" in the claim period section could be construed as meaning "accidental injury." Professor Larsen advocates this sensible construction, pointing out that an "accidental injury" is the very heart of the coverage formula.[45] Finally, the constitutionality of legislation that at once destroys common law rights for personal injuries sustained during the course of employment and prevents the right to compensation by a procedural road block such as an "accident" type limitation provision has been questioned,[46] especially if in the particular jurisdiction there exists a state constitutional provision, as in North Carolina, that purports to assure a legal remedy for every injury.[47] While the latter

[41] *Id.* at 57, 40 N.W.2d at 263.

[42] See, *e.g.*, Austin, *Essay on Interpretation,* in 2 JURISPRUDENCE 989 (5th ed. 1885). "Where a statute is remedial, and so entitled to a liberal construction, judicial *extensive* interpretation has always been recognized as *genuine* interpretation." (Emphasis added.)

[43] Mulhall v. Nashua Mfg. Co., 80 N.H. 194, 115 Atl. 449 (1921).

[44] As to the coverage formula, see Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949). *Cf.* Griffitts v. Humphrey, 199 Tenn. 528, 288 S.W.2d 1 (1955), expressly adopting the language of Salt Lake City v. Industrial Comm'n, 93 Utah 510, 74 P.2d 657 (1937) which is set out in the text at note 20 *supra.*

[45] 2 LARSEN, *op. cit. supra* note 13, § 78.42(d).

[46] *Ibid.*

[47] N.C. CONST. art. I, § 35: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law . . . ." As to the enactment of statutes in other jurisdictions abolishing civil actions for alienation of affections, criminal conversation, seduction, and breach of promise to marry, see, generally I VERNIER, AMERICAN FAMILY LAWS § 6 (1935). The constitutionality of such statutes generally has been

argument has considerable merit, it overlooks the fact that workmen's compensation is not predicated on negligence or any other historically actionable wrong, but creates a whole new statutory area of claims and liabilities that were non-existent at the common law. If it happened that in any particular case the accidental injury was caused by the negligence of the employer, denial of a remedy by way of the procedural bar might well violate such a constitutional guaranty.

The North Carolina court will presumably adhere to its strict construction policy, however, and if relief is to be had from the present straight "accident" type statute the General Assembly will probably have to provide it. The 1955 amendment, enlarging the claim period from one to two years after the accident, would at least prevent the harsh result of the *Whitted* case on its particular facts. But it is respectfully submitted that the claim period provision should be amended as follows:

N.C. GEN. STAT. § 97-24(a).—"The right to compensation under this article shall be barred unless a claim is filed with the Industrial Commission within two years from the date the employee knew or ought to have known the nature of his injury and its relation to the employment. If death results from such injury, claim must be filed with the Commission within one year after the death."

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upheld on the ground that the marriage contract results in a special relation created by the state, and thus subject to the state's control. Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815 (1936), *rehearing denied* 273 N.Y. 528, 7 N.E.2d 677, *appeal dismissed* 301 U.S. 667, *rehearing denied* 302 U.S. 774 (1937).